

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CHARLES W. AND DARLA R. KELLOGG, JR.,

Appellants,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 301

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

An informal hearing was held on April 26, 1973 in Vancouver, Washington before W. A. Gissberg, presiding officer and member of the Pollution Control Hearings Board, on the appeal to respondent's denial of appellants' Surface Water Application No. 23585 for the use of water for irrigation. Appellant appeared pro se; respondent appeared through its attorney, Wick Dufford.

On the basis of testimony heard and exhibits examined, the Pollution Control Hearings Board prepared Proposed Findings of Fact, Conclusions and Order which were submitted to the appellant and respondent on

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1 June 9, 1973. Objections or exceptions to the Proposed Order having
2 been received, the Pollution Control Hearings Board makes and enters
3 the following

4 FINDINGS OF FACT

5 I.

6 Over two years ago Charles W. Kellogg, Jr. and his wife, Darla R.
7 Kellogg (appellants herein) purchased 40 acres of land in the easterly
8 portion of Clark County, a few miles east of Battle Ground, for the
9 purpose of making their home and to raise cattle and grow hay to feed
10 them. Two unnamed streams originate upon and cross appellants'
11 property, the flow of which is generated by springs upon their property.
12 Both streams are tributaries of Salmon Creek which, in the lower reaches
13 supports fish life.

14 II.

15 Appellants seek to divert .80 cfs (cubic feet per second) of water
16 for stock watering and irrigation purposes from the outflow of an earthen
17 and rock dam constructed by their predecessors on the northerly stream.
18 The record does not reveal when the dam, pond and water diversion system
19 were constructed nor when water was first diverted by prior owners of the
20 land, although it is clear that it was at least prior to 1952. Since
21 acquiring the property, appellants were granted a certificate of water
22 right on the southerly stream for domestic use; such right is for .01 cfs
23 and one-acre foot per year.

24 III.

25 Several springs feed water to the stream, both above and below the
26 dam. By the time the stream leaves their property it contains five

27 FINDINGS OF FACT,
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1 times more than the one inch deep by ten inch wide flow found 100 yards
2 upstream from the dam and pond created by it.

3 IV.

4 For short times in September, portions of the stream temporarily
5 dry up in certain areas along its bed, both above and below the pond.
6 However, the stream never dries up where it leaves appellants' property
7 nor on its further three mile journey to Salmon Creek.

8 V.

9 In 1950, pursuant to RCW 75.20.050, the Director of Fisheries
10 established a policy against allowing diversions of water from Salmon
11 Creek and its tributaries. The same policy recommendation was orally
12 made by the Departments of Fisheries and Game as to appellants'
13 application.

14 VI.

15 Respondent's estimate is that the lowest flow of the stream at a
16 point immediately upstream of the pond is .02 cfs, but respondent did
17 not estimate nor measure the low flow of the stream below the pond,
18 neither on appellants' property nor downstream from it.

19 VII.

20 The denial of appellants' application was made solely upon the
21 recommendation of the Departments of Fisheries and Game. Significantly,
22 the only testimony of the Fisheries Department is that of its fisheries
23 biologist who established that an appropriation of .80 cfs of water
24 would significantly affect the summer flow of water in Salmon Creek,
25 but that the withdrawal of .02 cfs would not. Respondent does not
26 know how much or if any water is available for use.

27 From which comes these

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 CONCLUSIONS OF LAW

2 I.

3 The Department of Ecology is required by RCW 90.03.290 to
4 investigate a water application and determine: (1) what water, if any,
5 is available; (2) to what beneficial uses the water is to be applied;
6 (3) what lands are capable of irrigation from the water available;
7 (4) will the appropriation impair existing rights, and (5) will the
8 appropriation detrimentally affect the public welfare.

9 II.

10 Respondent has not determined (1) through (4) of the preceding
11 Conclusion.

12 III.

13 The evidence in the record does not support respondent's contention
14 that whenever the Departments of Fisheries or Game recommend against
15 issuing a water permit it necessarily follows that an appropriation would
16 detrimentally affect the public welfare.

17 IV.

18 It would not be in the public interest to grant appellants a water
19 right for .80 cfs, but it may be in the public interest to grant them
20 something less than that.

21 Now, therefore, since the record is silent upon: (1) how much
22 water, if any, is available for appropriation, and (2) whether the
23 appropriation of such water might result in lowering the flow of water
24 below the flow necessary to adequately support food and game fish
25 population in the stream, it is the Board's

26 FINDINGS OF FACT,
27 CONCLUSIONS AND ORDER

ORDER

1. The application is remanded to the Department of Ecology to determine how much water, if any, is available for appropriation. If there be any, respondent shall ascertain from the Departments of Fisheries and Game, based upon the stream flows of Salmon Creek, whether the appropriation of such water by appellants at their proposed point of diversion might result in the lowering of the flow of water in the stream below the flow necessary to adequately support food and game fish population in Salmon Creek.

2. Respondent shall reconsider appellants' application in light of the foregoing.

3. Respondent shall issue its reconsidered Order and the same shall be subject to appeal to the Board.

DONE at Lacey, Washington this 7th day of August, 1973.

POLLUTION CONTROL HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

W. A. Gissberg
W. A. GISSBERG, Member

James T. Sheehy
JAMES T. SHEEHY, Member